

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

SEP 05 2012

JAMES W. McCORMACK, CLERK
By: SWS REP. CLERK
PLAINTIFF

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

CONTECH CONSTRUCTION PRODUCTS, INC.

vs.

Case No. 4:12-cv-567-SWW

UNITED STATES DEPARTMENT OF LABOR

DEFENDANT

COMPLAINT

Plaintiff Contech Construction Products, Inc., by and through its attorneys Wright, Lindsey & Jennings LLP, for its complaint against the United States Department of Labor, states and alleges as follows:

This case assigned to District Judge Wright
and to Magistrate Judge Volpe

PARTIES, JURISDICTION AND VENUE

1. Plaintiff Contech Construction Products, Inc. ("Contech") is a corporation incorporated in Ohio with its principle place of business in Ohio and maintains a division of the company in Little Rock, Arkansas.

2. The United States Department of Labor ("Department of Labor") is a governmental department or agency of the United States of America.

3. This court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3), and pursuant to 5 U.S.C. § 552(a)(4)(B), as, on information and belief, the agency records at issue are situated in the Eastern District of Arkansas.

4. Venue is appropriate under 28 U.S.C. § 1391(b)(2) and (e)(2).

ALLEGATIONS AND CLAIMS FOR RELIEF

5. This complaint arises out of a Freedom of Information Act ("FOIA") request propounded by Contech to the Department of Labor's Occupational Safety and Health

Administration (“OSHA”), which request was in relation to a wrongful death lawsuit, *Davis v. Contech Construction Products, Inc., et al.*, Case No. 5:10-CV-349 SWW (E.D. Ark).

6. Contech’s FOIA request asked for information on any OSHA investigatory reports or files maintained on Sheridan Excavating, Inc. (“Sheridan Excavating”), Inspection # 313995466, pertaining to the incident that precipitated the wrongful death action.

7. On September 16, 2011, Contech received a letter and information from OSHA’s Little Rock Area Office. The Area Director deemed certain information in the report to be subject to various exemptions under the pertinent statute, 5 U.S.C. § 552. *See* Ex. 1.

8. On information and belief, the agency records and information that were produced by OSHA’s Little Rock Area Office are situated in the Eastern District of Arkansas.

9. On November 7, 2011, Contech sent an appeal letter (the “appeal”) to the Solicitor of Labor. Contech’s appeal was sent well within the 90-day period allowed for filing an appeal. *See* Ex. 2.

10. The information and report that OSHA provided to Contech consisted of 103 pages. Contech only appealed the redaction of information contained in Section III, Paragraph B, of the document titled “OSHA 1A Narrative Continued,” which is on page 56 of the information provided. The section containing the redaction at issue reads as follows:

The tie down straps that secured the entire load to the trailer had already been removed by the truck driver. It was reported to CSHO by Jerry Davis that (3) inch and a quarter metal bands held the two loads together on the trailer. When the deceased cut the last of the three straps, two of the culvert pipes fell from the trailer striking him on the head and upper body causing fatal injuries. From the location of the body in relation to the trailer (police photos) it appears that the middle band was cut last. This appears to be in conflict with the normal procedure described in an [INFORMATION REDACTED/DELETED BASED ON EXEMPTION 7d]

Product was purchased and shipped from Contech Construction Products located in Greenville, Mississippi. Mr. Davis believes it was an independent carrier that delivered the load.

(emphasis added). *See* Ex. 3.

11. On information and belief, the redaction at issue contains information that OSHA obtained during and by means of an employee interview, indicating that the employee whom OSHA interviewed described to OSHA certain “normal procedures” for cutting tie down straps, and that the employee told OSHA that the decedent’s cutting of the straps did not comply with or was in conflict with those normal procedures.

12. Thus, the redacted portion at issue in the OSHA report is of key significance to a dispositive issue in the related wrongful death case.

13. Furthermore, on information and belief, the only employee of Sheridan Excavating whom OSHA interviewed has already been identified as James (“Jimmy”) Taylor.

14. Thus, Contech contends that OSHA’s reliance on Exemption 7d is misplaced as it is applied to the redacted information on page 56.

15. Contech received a letter dated November 21, 2011, from the FOIA Appeals Unit Director for the Department of Labor, acknowledging receipt of Contech’s appeal. *See* Ex. 4.

16. On or about December 28, 2011, Contech received a final decision from the Department of Labor on Contech’s appeal of the OSHA redactions. *See* Ex. 5.

17. As indicated in the final decision, the Department of Labor has denied Contech’s appeal of OSHA’s redactions of the portion of the OSHA report at issue.

18. The Department of Labor's final decision also states that the "appeal decision constitutes final agency action for purposes of judicial review," and that Contech "has the option of seeking judicial review of this determination by filing suit against the Department of Labor."

19. Contech disagrees with the Department of Labor's final appeal decision. The redacted portion at issue in the OSHA report is of key significance to a dispositive issue in the related wrongful death case. The OSHA report states that in cutting the straps that held the load of pipes together, the decedent's actions "appear[ed] to be in conflict with the normal procedure described in an [REDACTED]." The plaintiff's or decedent's actions were obviously in conflict with the normal procedures of something, and that something will play a key role in determining what, if any, liability Contech has in the related wrongful death action.

20. Moreover, the identity of the Sheridan Excavating employee whom OSHA interviewed is already known to all parties and has been made a matter of public record by virtue of filings in the related wrongful death action, thus negating the validity of OSHA's or the Department of Labor's reliance on Exemption 7d.

21. Contech contends the Department of Labor's reliance on Exemption 7d—or any of the statutory exemptions, for that matter—is incorrect and misplaced, and that none of the statutory exemptions available to OSHA are applicable for purposes of redacting the requested information.

22. The foregoing allegations demonstrate the following: Contech has submitted a proper request for records; Contech's request conformed to the FOIA's, OSHA's, and the

Department of Labor's procedures; OSHA and the Department of Labor have failed to comply with Contech's request; and Contech has exhausted its administrative remedies.

RELIEF REQUESTED

23. Based on the foregoing allegations, Contech requests injunctive relief; that the Court conduct an *in camera* review, if necessary, of the redacted information at issue to determine the validity and applicability of the exemptions contained in 5 U.S.C. § 522; and that the Court order the Department of Labor to disclose the portion of the redacted information as set forth and described in this complaint.

WHEREFORE, Contech Construction Products, Inc., prays that the Court grant it injunctive relief; that the Court conduct an *in camera* review, if necessary, of the redacted information at issue; that the Court order the Department of Labor to disclose the portion of the redacted information set forth and described in the instant complaint; for its attorneys' fees and costs; and for all other proper relief to which it is entitled.

Respectfully submitted,

WRIGHT, LINDSEY & JENNINGS LLP
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By 

Roger A. Glasgow (69027)

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*Attorneys for separate defendant Contech
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U.S. Department of Labor

Occupational Safety and Health Administration
Little Rock Area Office
10810 Executive Center Drive
Danville Bldg 2 - Suite 206
Little Rock, AR 72211
Phone: (501) 224-1841
Fax: (501) 224-4431



Reply to the Attention of: Carlos M. Reynolds

September 16, 2011

WRIGHT, LINDSEY, & JENNINGS LLP
Attention: Carolyn Cossey
200 West Capitol Avenue
Suite 2300
Little Rock, AR 72201

Re: **Freedom of Information Act Request #2011-861 for:**
SHERIDAN EXCAVATING, INC., 313995466

Dear Requestor:

Enclosed is the information which you requested under the Freedom of Information Act regarding the above referenced investigative file(s).

Occupational Safety and Health files contain records compiled for law enforcement purposes and information contained in such records may be withheld in accordance with exemption 7 of the Freedom of Information Act (5 U.S.C. 552(b)(7)). I have determined, however, that some information can be released to you in the public interest which would not impede the discharge of any of the department's functions.

29 CFR 70.40 provides that the Department of Labor may charge \$10.00 per half man-hour spent in locating the file, \$20.00 per half man-hour spent in review and \$0.15 per reproduced page for copies of file documents. In this instance, 0.00 hours were spent in clerical search & review, there are 0 pages of reproduced files, CD-Rom copy of releasable photos, and mailing fees; therefore, your check or money order in the amount of \$0.00, should be made payable to "Department of Labor" and mailed to the above address. Please include your FOIA number with payment.

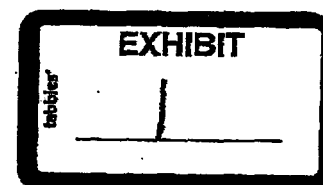
Certain information contained in the investigative file has been deleted. The deletions and the reasons therefore are as follows:

- A. The following items have been redacted because it contains matters protected from disclosure by a statute. (Exemption 1 of the Freedom of Information Act)

Exemption 1 - None.

- B. The following items have been redacted because they involve either/or trade secrets, financial information and are privileged and confidential. Disclosure of these documents would impede the discharge of Department of Labor functions and would not serve the public interest. (Exemption 4 of the Freedom of Information Act)

Exemption 4 - Where Indicated



- C. The following items have been redacted because they contain opinions contained in intra or interagency memoranda and letters. Matters that are opinions, evaluative or subjective in nature or exempted from disclosure by (Exemption 5 of the Freedom of Information Act)

Exemption 5 - Where Indicated

- D. The following items have been redacted because they are personnel, medical and/or similar files. Disclosure of these documents would constitute a clearly unwarranted invasion of privacy and are exempt from disclosure by (Exemption 6 of the Freedom of Information Act)

Exemption 6 - Where Indicated

- E. The following items have been redacted because they are contained in the investigatory file compiled for law enforcement proceedings and/or disclose the identities of confidential sources. (Exemption 7(a), 7(b), 7(c), 7(d), 7(e) and 7(f) of the Freedom of Information Act)

Exemption 7 - Where indicated.

You may file an appeal of this decision with the Solicitor of Labor within 90 days from the date of this letter. The appeal must state, in writing, the grounds for the appeal, including any supporting statement or arguments. To facilitate processing, you may wish to fax your appeal to (202) 693-5538. The appeal should include a copy of your initial request and a copy of this letter. The appeal must be addressed to:

Solicitor of Labor
Suite N-2428
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If mailed, both the envelope, and the letter of appeal itself should be clearly marked: Freedom of Information Act Appeal." The determinations of the Solicitor of Labor are subject to judicial review as provided by 5 U.S.C. 552.

I, the undersigned Area Director, am responsible for this information, my title is indicated below and official address appears at the heading of this letter.

If I may be of further assistance in this matter, please contact me.

Sincerely,

Carlos M. Reynolds,
Area Director

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(1911)
ALSTON JENNINGS
(1917-2004)
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November 7, 2011

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Suite N-2428
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Freedom of Information Act Appeal
Freedom of Information Act Request #2011-861 for:
SHERIDAN EXCAVATING, INC., 313995466

Dear Solicitor of Labor,

Our law firm represents Contech Construction Products, Inc., ("Contech") in litigation involving an Arkansas corporation, Sheridan Excavating, Inc. ("Sheridan Excavating"). Contech previously submitted a request under the Freedom of Information Act ("FOIA"), requesting information on any OSHA investigatory reports or files maintained on Sheridan Excavating, Inspection # 313995466..

On September 16, 2011, we received a letter and information from the Little Rock Area Office for the United States Department of Labor, Occupational Safety and Health Administration, in response to our FOIA request. A copy of the letter is enclosed for your reference as Exhibit 1. The Area Director deemed certain information to be subject to exemption 7 of the FOIA, and thus that information was redacted.

Out of the 103 pages of information provided, we are appealing only the redaction of information contained in Section III, Paragraph B, of the document titled "OSHA 1A Narrative Continued," which is found on page 56 of the information provided. A copy of the redacted section is enclosed for your reference as Exhibit 2.



WRIGHT, LINDSEY & JENNINGS LLP

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The text surrounding the redacted portion that is the subject of this appeal reads as follows:

The tie down straps that secured the entire load to the trailer had already been removed by the truck driver. It was reported to CSHO by Jerry Davis that (3) inch and a quarter metal bands held the two loads together on the trailer. When the deceased cut the last of the three straps, two of the culvert pipes fell from the trailer striking him on the head and upper body causing fatal injuries. From the location of the body in relation to the trailer (police photos) it appears that the middle band was cut last. This appears to be in conflict with the normal procedure described in an [INFORMATION REDACTED/DELETED BASED ON EXEMPTION 7d]

Product was purchased and shipped from Contech Construction Products located in Greenville, Mississippi. Mr. Davis believes it was an independent carrier that delivered the load.

See Ex. 2, at p. 56 (emphasis added). The information contained in Paragraph D, "Employee Interview"—which presumably contained the name of the employee who was interviewed—was also redacted, based on Exemption 7c.

As you are no doubt aware, Exemption 7d includes information that "could reasonably be expected to disclose the identity of a confidential source ..., and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source." 5 U.S.C. § 552(b)(7)(D). OSHA's was not a criminal investigation, and there is no past or present criminal investigation regarding the incident at issue. National security also is not involved.

Accordingly, the only remaining issue with respect to Exemption 7d is the first prong: whether the information could reasonably be expected to disclose the identity of a confidential source. See *Cooper Cameron Corp. v. United States Dep't of Labor, Occupational Safety and Health Administration*, 280 F.3d 539, 550 (5th Cir. 2002). "[T]he question is not whether the requested *document* is of the type that the agency usually treats as confidential, but whether the particular *source* spoke with an understanding that the communication would remain confidential." *United States Dep't of Justice v. Landano*, 508 U.S. 165, 172 (1992). A source is "confidential" under Exemption 7d if he "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." *Id.* (quoting S. Rep. No. 93-1200, at 13, U.S. Code Cong. & Admin. News pp. 6267, 6291). Where OSHA does not either explicitly or impliedly promise confidentiality to

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its source, then the source's statements are not exempt from disclosure. *See Cooper Cameron Corp.*, 280 F.3d at 552-53 (holding that material was not exempt from disclosure where there was no showing that the information requested would impede effective OSHA investigations, threaten the privacy of persons mentioned in that material, or reveal confidential identities).

We are already aware that James ("Jimmy") Taylor, a Sheridan Excavating employee, was interviewed as a part of OSHA's investigation. It is also our understanding that Mr. Taylor was the only employee interviewed, meaning that the confidentiality of his identity is no longer at issue or in need of protection. Indeed, it was the plaintiff who disclosed Mr. Taylor's identity and his interview with OSHA in his initial disclosures, a copy of which is enclosed for your reference as Exhibit 3. *See Exhibit 3*, at p. 2. Thus, the plaintiff would suffer no prejudice from the disclosure of the requested information.

Indeed, the fact that Mr. Taylor's identity is known to all parties indicates one of two things: (1) OSHA made no express or implied promise of confidentiality, or (2) Mr. Taylor waived his right to confidentiality.

To the extent that OSHA made any express or implied promise of confidentiality to Mr. Taylor, we respectfully contend that, since all parties involved know of his identity and that he participated in the OSHA investigation, such promise of confidentiality has now been waived. *See Akron Standard Div. of Eagle-Picher Industries, Inc. v. Donovan*, 780 F.2d 568, 573 (6th Cir. 1986) (holding that statements of witnesses must be disclosed where identities of the witnesses had already been made known, meaning that Exemption 7d had effectively been waived). The purpose of the promise of confidentiality is, obviously, to ensure that OSHA can conduct full investigations with the complete cooperation of company employees. Thus, to the extent that OSHA made any such promise to Mr. Taylor, OSHA would not be reneging on that promise by revealing the requested information, as any such confidentiality on Mr. Taylor's part is no longer applicable and has effectively been waived. *See id.*

One issue in this lawsuit is Contech's providing certain safety instructions for the unloading of corrugated metal pipes—which the plaintiff was unloading immediately prior to his death—and Sheridan Excavating's failure to abide by those instructions. Another parallel issue is whether Sheridan Excavating had its own policies and procedures for unloading materials, and whether the decedent failed to follow those policies and procedures.

The section of redacted information at issue states: "[I]t appears that the middle band was cut last. This appears to be in conflict with the normal procedure described in an REDACTED." *See Ex. 2*, at p. 56. Obviously, whatever information or document was redacted goes to the heart of central issues in this lawsuit. There is no indication that by revealing what document contained the "normal procedures" for cutting

WRIGHT, LINDSEY & JENNINGS LLP

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bands, OSHA would be disclosing the identity of a confidential source—especially where all parties already know the identity of the one employee who was interviewed, Jimmy Taylor. Even if the parties did not know the identity of the source, there is no indication that by disclosing the document, OSHA would thereby be placing in danger the source's confidentiality.

Therefore, we respectfully request that OSHA reconsider its redaction of information on page 56 of its investigatory information pursuant to Exemption 7d. We ask that OSHA grant our FOIA Appeal and provide the requested information as expeditiously as possible, as our discovery deadline in this matter is currently set for December 30, 2011.

Respectfully,

A handwritten signature in black ink, appearing to read 'Kyle R. Wilson', with a long horizontal stroke extending to the right.

Kyle R. Wilson

Attorney for Contech Construction Products, Inc.

OSHA 1A Narrative Continued

Name of Company: Sheridan Excavating, Inc.

Inspection #: 313995466

I. Nature and Scope of the Inspection:

A: Nature: Inspection conducted pursuant to fatality reported to LRAO on 1/14/10.

B: Scope: Partial, limited to circumstances surrounding the fatality.

C: Background Information: A search of IMIS showed no inspection history for Sheridan Excavating.

D: SIC High Hazard List ☐ Yes ☐ No

E:

7c

F: Interstate Commerce Information: Pipe was purchased from a company in Mississippi. (Contech Construction Products)

II. Opening Conference:

Walk-around Inspection:

During the walk-around inspection CSHO wore their personal protective equipment to include steel-toed boots, and safety glasses.

A: Work process Information:

Culvert pipe was delivered via semi tractor-trailer to the Sheridan yard to be unloaded. Pipe is eventually installed by Sheridan Excavating to maintain logging roads in the area.

B: Observations and Findings:

Incident occurred on 10/23/09 but not reported to OSHA until 1/14/10.

Information provided was that the deceased was attempting to unload 5 culvert pipes from a split load on a step flatbed trailer. Jerry Davis (company owner) had gone to look for the fork attachment for his material handling device and John Davis (deceased) went to look for a tool to cut the metal banding that secured the 5 top pipes (load for Sheridan Excavating) from the bottom pipes that were to be delivered to TJ Lambert and Company at a different site.

OSHA 1A Narrative Continued

Name of Company: Sheridan Excavating, Inc.

Inspection #: 313995466

The tie down straps that secured the entire load to the trailer had already been removed by the truck driver. It was reported to OSHA by Jerry Davis that (3) inch and a quarter metal bands held the two loads together on the trailer. When the deceased cut the last of the three straps, two of the culvert pipes fell from the trailer striking him on the head and upper body causing fatal injuries. From the location of the body in relation to the trailer (police photos) it appears that the middle band was cut last. This appears to be in conflict with the normal procedure described in an [REDACTED] 7d

[REDACTED] 7d

Product was purchased and shipped from Contech Construction Products located in Greenville, Mississippi. Mr. Davis believes it was an independent carrier that delivered the load.

C: Proposed Actions:

Citation for violation of 1904.39 failure to report a fatality within eight hours.
5(a)(1) citation for failure to provide a procedure that assures load is stable before releasing any tie down straps or bands.

D: Employee Interview:

[REDACTED] 7c

IV: Occupational Health Programs:

Review of Specific Programs:

N/A

V. Closing Conference:

Closing conference was held via telephone with Jerry Davis on 2/16/2010.
OSHA 3000 pamphlet and SBA letter were sent via US Mail.

List of Items Provided to Employer:

OSHA 3000 Provided:	<input checked="" type="checkbox"/>
Apparent Violations Explained:	<input checked="" type="checkbox"/>
Abatement Assistance Offered:	<input type="checkbox"/>
Consultation Services Explained:	<input checked="" type="checkbox"/>

U.S. Department of Labor

Office of the Solicitor
Washington, D.C. 20210



Appeals Unit
Freedom of Information Act / Privacy Act
200 Constitution Ave., N.W., Rm. N-2428
Phone: 202-693-5503
Fax: 202-693-5538

November 21, 2011

To: KYLE R. WILSON
200 WEST CAPITOL AVENUE, - SUITE 2300
LITTLE ROCK, AR 72201-3699

From: Raymond E. Mitten Jr.
Director, FOIA Appeals Unit

Re: Your Appeal to the Solicitor of Labor under the Freedom
of Information Act and/or Privacy Act
SHERIDAN EXCAVATING, INC.

Date of your letter: 11/7/2011

Appeal Reference No.: 120055

This is to acknowledge receipt of your letter appealing a denial of information by a Department of Labor official. Your appeal is being processed.

The law generally requires that appeals be sequenced for action on a first-in first-out basis, consistent with the guidance provided by the courts. *See Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976). You should be aware that the number of appeals currently awaiting review and decision is very substantial. We are authorized, however, to schedule for faster action those appeals which require limited staff time -- i.e., those that involve limited scope or complexity.

Should you have any questions about the status of your appeal, have any additional information which you believe should be brought to our attention, or wish to limit or withdraw your appeal, please contact this office at the phone or address listed above.

To help us serve you, please direct your inquiries to Linda Robinson at the number noted above, and use our appeal reference number. Thank you.

EXHIBIT

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U.S. Department of LaborOffice of the Solicitor
Washington, D.C. 20210

Kyle R. Wilson
Wright, Lindsey & Jennings, LLP
200 West Capitol Avenue
Suite 2300
Little Rock, AR 77201-3699

DEC 28 2011

Re: FOIA Appeal No. 120055

Dear Mr. Wilson:

This decision is in response to your letter dated November 7, 2011, appealing, on behalf of your client, Contech Construction Products, Inc., under the Freedom of Information Act (FOIA) the September 16, 2011, determination of Carlos M. Reynolds, Area Director, Occupational Safety and Health Administration (OSHA). You have appealed OSHA's withholding of information concerning OSHA inspection number 313995466, Sheridan Excavating, Inc. In this appeal, you seek an unredacted copy of the first paragraph of an OSHA Inspection Narrative Report, page 56 of the 103 pages released by OSHA. You enclosed a copy of the redacted page with your FOIA appeal letter for our reference.

We obtained the page containing the redacted material you seek from OSHA and conducted a *de novo* review of the material you requested. After reviewing this information, we affirm OSHA's redaction of information in this paragraph pursuant to exemptions 7(C) and 7(D).

FOIA requires that agencies generally disclose records. Agencies may withhold requested records only if one or more of nine exemptions apply. We have withheld the requested information entirely because it contains no reasonably segregable information that may be released without creating the harm the indicated exemptions were designed to prevent. *See, e.g., Flightsafety Services Corp. v. Dep't of Labor*, 326 F.3d 607, 613 (5th Cir. 2003).

Exemption 7, 5 U.S.C. § 552(b)(7), allows agencies to refuse to disclose records compiled for law enforcement purposes under any one of six circumstances (identified as exemptions 7(A) through 7(F)). "Law enforcement" within the meaning of exemption 7 includes enforcement pursuant to both civil and criminal statutes. *See, e.g., Tax Analysts v. Internal Revenue Service*, 294 F.3d 71, 76-77 (D.C. Cir. 2002). More specifically, enforcement of labor legislation, such as the enforcement activity at issue in this case, has been held to be "law enforcement" within the meaning of exemption 7. *See, e.g., Farmworkers Legal Services of North Carolina, Inc. v. U.S. Dep't of Labor*, 639 F. Supp. 1368, 1373-74 (E.D.N.C. 1986) (protecting records of the Wage and Hour Division under exemption 7); *Cooper Cameron Corp. v. U.S. Dep't of Labor, Occupational Safety and Health Admin.*, 280 F.3d 539, 545 (5th Cir. 2002) (finding that OSHA inspection records are law enforcement records for purposes of exemption 7); and *Copus v. Rougeau*, 504 F. Supp. 534, 538 (D.D.C. 1980) (finding that Office of Federal Contract Compliance Programs records are law enforcement records for purposes of exemption 7).

Exemption 7(C) permits an agency to withhold information contained in files compiled for law enforcement purposes if production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Thus, the purpose of exemption 7(C) is

EXHIBIT

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to protect the privacy of any person mentioned in law enforcement records. In determining whether a protected privacy interest exists, we must evaluate not only the nature of the personal information found in the records, but also whether release of that information to the general public could affect that individual adversely. *See, e.g., L & C Marine Transport, Ltd. v. United States*, 740 F.2d 919, 922 (11th Cir. 1984). Thus, we must consider whether release of even seemingly innocuous personal information could lead to the harassment or annoyance of an individual through unsolicited inquiries. *See, e.g., Miles v. U.S. Dep't of Labor*, 546 F. Supp. 437 (M.D. Pa. 1982). We find that release of personal identifying information withheld here reasonably could be expected to have a negative impact on an individual's privacy.

Our inquiry does not end there, however. Before we may withhold information under 7(C), we must determine that an invasion of personal privacy is "unwarranted." Even if a privacy interest exists, we must nevertheless disclose the requested information if the public interest outweighs the privacy interest in the information requested. *See, e.g., U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 776 (1989). In *Reporters Committee*, the Supreme Court made clear that, for FOIA purposes, "public interest" is limited to the public's right to be informed about the workings of its government. *Id.* at 773. Thus, the test for "public interest" under FOIA is not whether there is a general interest in the information, such as the type of interest that may exist in celebrities, weather events, natural disasters, or high-profile litigation. Rather, "the basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (citations omitted).

The Supreme Court has addressed this weighing of the public interest against a citizen's privacy interest. The Court stated: "[W]e hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted.'" *Reporters Committee* at 780.

You have not established that release of the information at issue would shed light on government operations, and we have not found such a public interest in this case. For this reason, after reviewing the information in question, we have determined that disclosure would be an unwarranted invasion of personal privacy.

Exemption 7(D) protects from disclosure information that reasonably could be expected to identify persons or entities providing data to the government in confidence or under circumstances implying confidentiality. *See* 5 U.S.C. § 552(b)(7)(D) and H.R. Conf. Rep. No. 93-1380, at 13 (1974). The applicability of exemption 7(D) does not end with termination of an investigation because the potential harm or scrutiny to which a confidential informant may be subjected is not dependent upon the phase of an investigation. Rather, potential harm may result from the mere fact that an individual communicated with the government. *See, e.g., Pope v. United States*, 599 F.2d 1383, 1387 (5th Cir. 1979); *Diamond v. Fed. Bureau of Investigation*, 707 F.2d 75, 76 (2nd Cir. 1983); *Interstate Motor Freight System v. U.S. Dep't of Labor*, 554 F. Supp. 692 (W. D. Mich. 1982) (upholding the Department of Labor's use of exemption 7(D) to

protect the names of witnesses who assisted the Wage and Hour Division in a Fair Labor Standards Act investigation).

The government generally is “not entitled to a presumption that a source is confidential . . . whenever the source provides information” in the course of an investigation. *U.S. Dep’t of Justice v. Landano*, 508 U.S. 165, 181 (1993). However, “to establish ‘the confidentiality of the source,’ . . . it is only necessary to show that the information was given under an express assurance of confidentiality or in circumstances where such an assurance could reasonably be inferred.” *Radowich v. United States Attorney, Dist. of Maryland*, 658 F.2d 957, 960 (4th Cir. 1981); see also *Landano*, 508 U.S. at 177 (“[W]e agree with the Government that when certain circumstances characteristically support an inference of confidentiality, the Government similarly should be able to claim exemption under Exemption 7(D) without detailing the circumstances surrounding a particular interview”). The circumstances under which OSHA conducts interviews typically bring about an expectation of confidentiality, in which employees or others providing information expect that their cooperation will not be reported to their employers or be made public. Because enforcement of the Occupational Safety and Health Act depends upon information elicited from these vulnerable sources, they must be protected in order to further effective law enforcement. Additionally, the witness statement in this case from which the Inspection Narrative paragraph at issue was drawn contains an explicit assurance of confidentiality. For these reasons, we are withholding information that may identify confidential informants.

You assert that [e]xemption 7(D) should not apply to the requested information, citing *Cooper Cameron Corporation v. U.S. Dep’t of Labor Occupational Safety and Health Administration*, 280 F.3d 539 (5th Cir. 2002) as support for your argument. The controlling issue is whether confidentiality was provided either expressly or in circumstances where confidentiality can be implied. In *Cooper Cameron*, the court stated that “OSHA has given us no such indication, and our *in camera* review of the requested material unearthed no evidence of express assurances [of confidentiality].” *Id.* at 551. The court in *Cooper Cameron* further held that no such confidentiality existed under the circumstances under which the particular statements in that case were taken but the court recognized that “the government can establish implied confidentiality . . . by specifically showing that circumstances surrounding the investigation support an inference of confidentiality.” *Id.* at 551. OSHA has informed us that, during the interview, an explicit verbal assurance of confidentiality was given. Additionally, the written witness statement from which the requested passage of the Inspection Narrative draws information contains an explicit assurance of confidentiality by OSHA. OSHA further informs us that confidentiality could be implied from the circumstances under which the interviews were conducted, as the witness was taken, in private, to a conference room, in the course of the OSHA investigation, by two OSHA CSHOs, where detailed and private questions were asked in regards to the investigation. Therefore, the instant case is distinguishable from *Cooper Cameron*.

You have indicated that, even if an assurance of confidentiality was provided, the confidentiality of the witness is no longer an issue, because it is your understanding that there was only one employee witness, and his name was disclosed to you in private litigation against your client. We neither confirm nor deny the person you name in your FOIA appeal letter is the person OSHA interviewed in this investigation. In any event, the standard under FOIA is not whether

disclosure of information to a particular requester or parties in litigation may threaten an individual's privacy. Rather, as mentioned, under FOIA we must consider the potential effects of a release to the general public. In this case, we have determined that disclosure of this information to the public would implicate privacy interests. For this reason, we must withhold this information.

The private needs of requesters for documents in connection with litigation play no part in whether disclosure is warranted under FOIA. *See, e.g., L & C Marine Transport, Ltd.*, 740 F.2d at 923. The primary purpose of FOIA is to inform the public of agency action and not to benefit private litigants or to serve as a substitute for discovery. *See, e.g., Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975). In addition, we note that a FOIA requestor's basic rights to access "are neither increased nor decreased" by virtue of having a greater interest in the records than that of an average member of the public. *Id.* For this reason, we have provided you with the same information we would provide to any other requester.

Our failure to assert any other exemption or defense that may apply in this appeal does not constitute a waiver of that exemption or defense.

This appeal decision constitutes final agency action for purposes of judicial review. The Freedom of Information Act provides for judicial review of administrative decisions denying a request in whole or in part. 5 U.S.C. § 552(a)(4)(B). You have the option of seeking judicial review of this determination by filing suit against the Department of Labor. A complainant may bring suit in the district court of the United States in the jurisdiction in which the complainant resides or has his or her principal place of business, or in which the agency records are maintained, or in the District of Columbia.

Sincerely,

A handwritten signature in black ink, appearing to read "Rose Marie L. Audette", with a stylized, flowing script.

Rose Marie L. Audette
Acting Associate Solicitor for Management
and Administrative Legal Services